UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW AMERICAN RESTORATION, INC.,

Plaintiff,

- against -

WDF, INC.,

Defendant.

10 Civ. 3638 (RMB)

FINDINGS OF FACT & CONCLUSIONS OF LAW

I. Background

On May 4, 2010, New American Restoration, Inc. ("New American" or "Plaintiff"), a construction subcontractor, filed a complaint against WDF, Inc. ("WDF" or "Defendant"), a general contractor, alleging that WDF breached contracts between the parties by failing to pay New American for certain asbestos abatement work it performed between 2005 and 2006 at two public school renovation sites, P.S. 4 and I.S. 10, for the New York City School Construction Authority ("SCA"). (Compl., dated Apr. 30, 2010, ¶¶ 6–7.) Plaintiff alleged that in addition to the "base contract work" it performed for WDF, Plaintiff also conducted additional, "change order" work, for which New American has not been paid by WDF. (Id. ¶¶ 8–10, 17–19; see Pl.'s Statement of the Elements of its Claims and Summary of the Facts Relied Upon, dated May 4, 2012 ("Pl.'s Statement"), at 3–4.)

On February 10, 2011, the parties reached a "partial settlement." New American and WDF "agreed to settle the base contract claims, including interest, for $127,712.51." (Hearing

Tr., dated Feb. 10, 2011 ("2/10/11 Tr.") at 9:19–20.)[1] The only unresolved issue is WDF's liability, if any, with respect to additional or change order work conducted by New American for the P.S. 4 and I.S. 10 Projects. (See Pl.'s Statement, at 1; Defendant's Pre-Trial Statement, dated May 4, 2012 ("Def.'s Statement"), at 1.)

A bench trial was held on September 25, 2013 and October 3, 2013. (See Trial Tr., dated Sept. 25, 2013 ("9/25/13 Tr."); Trial Tr., dated Oct. 3, 2013 ("10/3/13 Tr.").) At the trial, the Court had an excellent opportunity to observe witness demeanor and assess credibility during cross examination and re-direct examination.

Before the trial, the parties submitted, among other things, a joint pre-trial order, dated January 24, 2011; Plaintiff's Statement of the Elements of its Claims and Summary of Facts Relied Upon, dated May 4, 2012; and Defendant's Pre-Trial Statement, dated May 4, 2012. And, in lieu of live direct testimony, New American submitted the affidavit of its President, Milance Hadzic, dated May 3, 2012 ("Hadzic Decl."), a supplemental affidavit of Milance Hadzic, dated August 21, 2013, and an affidavit of its former Vice President, Goran Lazaravic, dated May 3, 2012 ("Lazaravic Decl."). WDF submitted the direct testimony affidavit of Nicholas Marzigliano, then-senior vice-president of WDF, dated May 4, 2012 ("Marzigliano Decl.").

Following the trial, on November 27, 2013, New American submitted proposed post-trial findings of fact and conclusions of law. (Pl.'s Proposed Findings of Fact and Conclusions of Law, dated Nov. 27, 2013 ("Pl.'s Findings and Conclusions").) New American contends that **(i)** based upon the parties' written contract for the P.S. 4 Project, it "should be allowed the full

[1] This sum consists of $30,791.02 for the I.S. 10 Project, $81,237.50 for P.S. 4, and $15,683.99 in interest. (2/10/11 Tr. at 9:10–20.)

amount of its claim arising from the additional work it performed on the P.S. 4 Project, and thus be awarded $79,101.09"; and **(ii)** "[a]s there is no written contract governing the parties' rights and obligations relating to Plaintiff's work on the I.S. 10 Project," New American is entitled to $294,874.86 for the additional work it performed at I.S. 10 under a theory of quantum meruit. (Id. at 14–15.)

On November 26, 2013, WDF submitted its proposed post-trial findings of fact and conclusions of law. (Def.'s Proposed Findings of Fact, dated Nov. 26, 2013 ("Def.'s Findings of Fact"); Def.'s Proposed Conclusions of Law ("Def.'s Conclusions of Law").) WDF contends that **(i)** pursuant to the (written) contracts between the parties for the P.S. 4 Project, "Defendant WDF is not liable to the Plaintiff for any amounts claimed by the Plaintiff for additional work which exceed the amounts recovered by WDF from the SCA"; and **(ii)** with respect to I.S. 10, New American cannot bring a quantum meruit claim because "there exists a contract governing how payment for extra work will be determined."[2] (Def.'s Conclusions of Law at 2–4.)

For the reasons stated below, Plaintiff has failed to prove its case by a preponderance of the evidence and may recover only the amounts WDF received from the SCA for the additional or change order work, i.e., $27,622.37 for P.S. 4 and $17,886.89 for I.S. 10.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court's Findings of Fact and Conclusions of Law follow.

[2] And, according to Defendant, the contract for the I.S. 10 Project contains the same provisions as the P.S. 4 Contracts, which provide that WDF is not liable for any amounts claimed by the Plaintiff for additional work which exceed the amount recovered by WDF from the SCA.

II. Findings of Fact

1. New American is a New Jersey corporation with its principal place of business at 22 California Avenue, Paterson, New Jersey. (Compl. ¶ 3; Pl.'s Findings and Conclusions ¶ 1.)

2. New American is engaged in the business of asbestos abatement work. (Pl.'s Findings and Conclusions ¶ 1.)

3. WDF is a New York corporation engaged in the business of general construction contracting. (Id. ¶ 2.)

4. Milance Hadzic is the President of New American. (Hadzic Decl. ¶ 1; 9/25/13 Tr. at 41–42.)

5. Bob Brocilovic was the New American project manager for the P.S. 4 and I.S. 10 Projects. He was "allow[ed] . . . to sign contracts on behalf of New American." (See 9/25/13 Tr. at 15–16; 26–28.)

6. There are three relevant construction subcontract agreements, two for the P.S. 4 Project (the "P.S. 4 Contracts"), and one for the I.S. 10 Project (the "I.S. 10 Contract"). (See Subcontract Agreement for PS-4X Floors, dated Oct. 14, 2005 (Ex. H to Def.'s Statement) ("P.S. Floors Contract"); Subcontract Agreement for P.S. 4X-171X, dated Oct. 6, 2005 (Ex. I to Def.'s Statement) ("P.S. 4 Contract"); Subcontract Agreement for I.S. 10/P.S. 200 (Ex. 11 to Pl.'s Statement) ("I.S. 10 Contract"), at 1; 9/25/13 Tr. at 45:9–21.)

P.S. 4 Project

7. In June 2005, the SCA retained WDF as general contractor to perform certain renovations at the P.S. 4 location in the Bronx. (Marzigliano Decl. ¶4.) Part of the P.S. 4 Project involved asbestos abatement. (Hadzic Decl.¶ 7; Marzigliano Decl. ¶ 5.)

8. On October 6, 2005 and October 14, 2005, New American, by its project manager, Mr. Brocilovic, and WDF, by its senior vice-president, Mr. Marzigliano, signed two subcontractor agreements pursuant to which New American would perform asbestos removal work at the P.S. 4 Project for $485,000.00 and $350,000.00, respectively. (See P.S. 4 Contract at 21; P.S. 4 Floors Contract at 21; Hadzic Decl. ¶ 12; Marzigliano Decl. ¶ 7; 9/25/13 Tr. at 38.)

9. New American "performed the base contract work for the P.S. 4 Project." (Pl.'s Findings and Conclusions at 3.)

10. On June 1, 2006, during the course of its base contract work on the P.S. 4 Project, Plaintiff was instructed by WDF to do additional asbestos abatement work pursuant to a "Notice of Direction" ("NOD") issued by the SCA. (9/25/13 Tr. at 72:18–73:22.) Plaintiff, and other contractors in the New York City construction industry, refer to such additional work as "change order work." (Pl.'s Findings and Conclusions at 3.)

11. The established practice in performing change order work for the SCA is for the contractor or subcontractor to proceed immediately with the work as described in the NOD. (9/25/13 Tr. at 86:2–87:23 ("THE COURT: All right. Could you tell us what happens when there is a change, you know, something different happens on a job? THE WITNESS [Mr. Marzigliano]: The SCA will issue what's known as a NOD, which is a notice of direction, directing you what they want you to do . . . Under the agreement with the SCA, you have to do whatever they tell you to do . . . then we relay that on to the subcontractors to proceed with the work because per the SCA agreement you have to proceed immediately with the work.").) At a later date, the general contractor negotiates with the SCA for payment. (Marzigliano Decl. ¶ 31; see also 9/25/13 Tr. at 90:7–11 ("[Mr. Marzigliano:] [T]he SCA, as the construction manager for the Department of Education, has to have the schools open on certain dates, so they removed the

time element. You know, from trying to get to negotiate your money, you do the work and, unfortunately, you are negotiating after the fact."); id. at 57:23–58:1 ("Q. How do you understand the change order process works? Does WDF negotiate with the SCA for your change orders, is that correct? A. [Mr. Hadzic] Yes.").) In fact, Plaintiff participated in change order negotiations with the Defendant and the SCA with respect to the P.S.4 and I.S. 10 Projects. (9/25/13 Tr. at 51:3–17 (THE COURT: So there was you and Bob Brocilovic, or whatever, somebody from WDF, too? THE WITNESS [Mr. Hadzic]: Yes . . . THE COURT: And there was at least one or two persons there from SCA, right, at the meeting? Was there a meeting? THE WITNESS: A meeting, yes. THE COURT: And was the purpose of the meeting? To discuss change orders? THE WITNESS: Yes.").) Ultimately, the SCA determines the amount that it will pay the contractor and/or subcontractor for the change order work, and issues its decision in the form of a "change order." (See Change Order No. 00006S from the New York City School Construction Authority to WDF, Inc., dated Sept. 11, 2007, at 1.)

The SCA regularly issues change orders for its projects and often determines that the value of work performed pursuant to change orders is less than the amount requested by subcontractors. (See 9/25/13 Tr. at 97:21–25 ("THE COURT: So just to get an order of magnitude with this change order business at the SCA, how common are they in projects? THE WITNESS [Mr. Marzigliano]: Change orders? Every project has change orders.") id. at 92:24–93:7 ("THE COURT: Do I take it from the reason we are here is that the sub in these two cases is not happy with the outcome of the SCA – THE WITNESS: I would imagine they wouldn't be happy . . . THE COURT: By the way, does that ever happen in other instances that subs are [unhappy with the outcome?] THE WITNESS: Just about every day.").)

12. The June 1, 2006 NOD, entitled "Notice of Direction 00004" ("NOD 00004"), required New American to do the following: "Provide labor and material to perform asbestos abatement while drilling holes at main building floor." (New York City School Construction Authority, Notice of Direction 00004, dated June 1, 2006 (Ex. 2 to Pl.'s Statement), at 17.)

13. Pursuant to NOD 00004, New American performed work at P.S. 4 which "involved . . . drilling large holes in various surfaces (including the floors and walls in the school) so that the material behind the outer surface of the respective floors and walls could be tested to determine whether they contained asbestos." (Hadzic Decl. ¶ 27.)

14. New American attended meetings with WDF at the SCA Change Order Unit in May, 2011 and August, 2011, at which "WDF negotiated in good faith with the SCA for the Plaintiff's claims of additional work at the [P.S.] 4/171 Project." (Marzigliano Decl. ¶ 12; 9/25/13 Tr. at 96:11–18.) In the end, the SCA determined that "the fair and reasonable value of such additional work by the Plaintiff's [sic] [was] $27,622.37", and issued a change order authorizing payment to Plaintiff in that amount. (Marzigliano Decl. ¶ 12.)

15. The P.S. 4 Contracts between WDF and New American, dated October 6 and 14, 2005, contain a section entitled "Article 9-Change Orders", which specifically provides that "the Subcontract Price and time adjustments hereunder shall be limited to the amount and extent of the adjustments actually allowed Contractor and/or GC under the Contract Documents", i.e., by the SCA. (P.S. 4 Floors Contract at 7; P.S. 4 Contract at 7.)

16. Each of the three written contracts between New American and WDF referred to in paragraph 6 above defines "Contract Documents" as "(a) this Subcontract and the exhibits, schedules and other supporting materials to which the Subcontract refers, some of which are attached hereto, and (b) the prime contract between the Owner [the SCA], whether directly or

through an agent such as the Contract Manager, and the General Contractor or Contractor, as the case may be, (the 'Prime Contract') and the documents to which the Prime Contract refers." (P.S. 4 Floors Contract, art. 1; P.S. 4 Contract, art. 1; I.S. 10 Contract, art. 1.)

17. WDF's witness, Nicholas Marzigliano, testified that "[p]ursuant to the provisions of 'Article 9-Change Orders' of the P.S. 4 Contracts, WDF is entitled to settle subcontractor claims [for change order work] with the SCA, the results of which settlement are binding on the Plaintiff." (Marzigliano Decl. ¶ 10.) In this case, New American, as subcontractor, actually attended and participated in such settlement negotiations. (See Findings of Fact ¶ 11, supra.)

18. Exhibit B to the P.S. 4 Contracts provides that "[t]his subcontractor acknowledges that it shall not be entitled to a change order for additional money, unless a change order [is] issued by the NYCSCA." (P.S. 4 Floors Contract at 27, ¶ 19; P.S. 4 Contract at 27, ¶ 19.) [3]

19. Pursuant to the provisions of "Article 27-Disputes" of the P.S. 4 Contracts, WDF is not liable to the Plaintiff for any amounts claimed by the Plaintiff which exceed the amounts recovered (or agreed to) by WDF from the SCA for that work: "In no event shall Contractor be liable to the Subcontractor for Subcontract Work performed or for any cause whatsoever, except to the extent that Contractor may recover therefore, from the Owner." (P.S. 4 Floors Contract at 17; P.S. 4 Contract at 17.) Each of the three contracts between New American and WDF defines "Owner" as the SCA. (P.S. 4 Floors Contract at 1; P.S. 4 Contract at 1; I.S. 10 Contract at 1.) That amount was $27,622.37 for the P.S. 4 Project.

[3] In this case, the SCA issued two change orders, one for the P.S. 4 Project in the amount of $27,622.37 (Marzigliano Decl. ¶ 12), and one for the I.S. 10 Project in the amount of $17,886.89. (Id. ¶ 52.)

I.S. 10 Project

20. On or about April 23, 2003, the SCA and WDF entered into a contract retaining WDF as general contractor to perform "Heating System Modifications" at I.S. 10, including asbestos abatement. (Compl. ¶ 6.)

21. On or about May 23, 2005, New American was requested by WDF to perform asbestos abatement work as a subcontractor for WDF at I.S. 10. (Id. ¶ 21.) On or about September 22, 2005, Mr. Hadzic, as President of New American, signed a contract between New American and WDF to perform asbestos abatement work at I.S. 10 for $250,000.00. (I.S. 10 Contract at 1, 24, 30–31; 9/25/2013 Tr. at 41:7–42:10.) While neither party signed the I.S. 10 Contract on the signature page (I.S. 10 Contract at p. 19), Mr. Hadzic did sign the I.S. 10 Contract on three separate pages, specifically the Equipment Use Release, Project Labor Agreement, and Safety Rider. (See I.S. 10 Contract at p. 24 (Equipment Use Release), p. 30 (Project Labor Agreement), and p. 31 (Safety Rider); see also 9/25/13 Tr. at 43:24–45:7, 70:16–72:5; Hadzic Decl. ¶ 16.)

22. At trial, Mr. Hadzic testified that he signed the I.S. 10 Contract's Equipment Use Release, Project Labor Agreement, and Safety Rider pages because he wanted to have an agreement with WDF. (9/25/2013 Tr. at 41:7–42:10 ("Q. Mr. Hadzic, this is a contract for I.S. 10/200 for an amount of $250,000, is that correct? A. Yes. THE COURT: Are you familiar with this contract? THE WITNESS: Yes. THE COURT: . . . That appears to be signed by you, is that right? THE WITNESS: Yes. THE COURT: That is your signature? THE WITNESS: Yes. THE COURT: And you signed this as president? THE WITNESS: Yes. THE COURT: And why did you sign it? THE WITNESS: I signed the contract. This contract is $250,000. THE COURT: So you wanted to have a contract? THE WITNESS: Yes. THE COURT: With the

defendant, right, for 250,000? THE WITNESS: Yes. THE COURT: And that's why you signed it? THE WITNESS: Yes."); id. at 43:24–45:6 ("Q. Mr. Hadzic, if I can trouble you just to turn to page 36 of 36, the last piece of paper in this binder. Is that your signature that appears on the safety rider? . . . THE WITNESS: Yes. . . . THE COURT: . . . So when you signed this document, these two pages, right, 35 and 36 -- do you see that? THE WITNESS: Yes. THE COURT: So was it your idea that was because you had a contract with the defendant to work on this I.S. 10 project; is that the reason? THE WITNESS: Yes.").)

23. The I.S. 10 contract is not countersigned by WDF. (I.S. 10 Contract at 24.) However, WDF's witness, Mr. Marzigliano, testified at trial that he believed there was a written, signed contract for the I.S. 10 Project. (See 10/3/13 Tr. at 117:15–16 ("Q. Was there a written signed contract for I.S. 10? A. As far as I know, yes.")

24. New American states that it "performed its services on the I.S. 10 Project in good faith" and that "those services were accepted by WDF and SCA." (Pl.'s Findings and Conclusions ¶ 34.) New American concedes that it "performed what was . . . intended to be the base contract work for the [I].S. 10 Project, and has been paid for such." (Id. at 3.)

25. The I.S. 10 Contract "contains the same provisions regarding Change Orders and Disputes, respectively, as are contained in the [P.S. 4 Contracts]." (Marzigliano Decl. ¶ 26; I.S. 10 Contract at 7, 17, 27 at ¶ 24.)

26. On July 28, 2006, during the course of its base contract work on the I.S. 10 project, Plaintiff was instructed by WDF to perform additional work pursuant to an NOD issued by the SCA. The July 28, 2006 NOD, entitled "Notice of Direction 00006" ("NOD 00006"), required New American to "[p]rovide labor and material for ceiling removal under ACM [asbestos-containing material] procedure." (Notice of Direction 00006 from the New York City

School Construction Authority to WDF, Inc., dated July 28, 2006 (Ex. N to Def.'s Statement), at 1.)

27. New American "furnished, provided and supplied the work, labor and services required on its part to be supplied and performed pursuant to the . . . Change Order Work for the I.S. 10 Project." (Hadzic Decl. ¶ 18.)

28. In April and June, 2011, New American attended meetings with WDF and representatives of the SCA Change Order Unit to negotiate New American's claims for additional work on the I.S. 10 Project. (Marzigliano Decl. ¶ 51; 9/25/13 Tr. at 58:18–59:2 ("Q. How about I.S. 10/200? I.S. 10/200, did you go to any meetings with WDF and the SCA to resolve the open change orders? A. [Mr. Hadzic] Yes . . . THE COURT: How many times? . . . THE WITNESS: Twice. Two or three times.").)

29. "During the June, 2011 meeting, the SCA and WDF came to an agreement that . . . the additional compensation due to the Plaintiff for additional work associated with NOD 00006 was $17,886.89." (Marzigliano Decl. ¶¶ 51–52.) The SCA subsequently issued a change order authorizing payment to Plaintiff in that amount. See Change Order No. 00006S from New York City School Construction Authority to WDF, Inc., dated Sept. 23, 2011 (Ex. Q to Def's Statement), at 3–4.)

III. Conclusions of Law

(i) WDF's liability to New American for change order work conducted for the P.S. 4 Project is limited to $27,622.37 (the amount approved by the SCA)

1. Plaintiff argues that it "should be allowed the full amount of its claim arising from the additional work it performed on the P.S. 4 Project, and thus be awarded $79,101.09." (Pl.'s Findings and Conclusions at 14.) WDF responds that, pursuant to the P.S. 4 Contracts,

"Defendant WDF is not liable to the Plaintiff for any amounts claimed by the Plaintiff for additional work which exceed the amounts recovered by WDF from the SCA." (Def.'s Findings of Fact at 2–4.) The amount approved by the SCA was $27,622.37.

2. The P.S. 4 Contracts are valid and enforceable and the parties are bound by their terms. (See Lazarevic Decl. ¶ 14; Pl.'s Findings and Conclusions at 14; see also Findings of Fact ¶ 8, supra.) "When interpreting a contract under New York law, the intention of the parties should control, and the best evidence of intent is the contract itself." Cont'l Ins. Co. v. Atl. Cas. Ins. Co., 603 F.3d 169, 180 (2d Cir. 2010) (internal quotations omitted). "[I]f an agreement is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms." Hatalmud v. Spellings, 505 F.3d 139, 146 (2d Cir. 2007).

3. The Court concludes that the P.S. 4 Contracts limit New American's payment for its change order work to the amount that WDF recovered from the SCA for such work. As noted, the contracts contain a section entitled "Change Orders," which provides that "the Subcontract Price and time adjustments hereunder shall be limited to the amount and extent of the adjustments actually allowed Contractor and/or GC under the Contract Documents." (P.S. 4 Floors Contract at 7; P.S. 4 Contract at 7.) WDF's witness, Nicholas Marzigliano, confirmed this interpretation of the P.S. 4 Contract provisions in his affidavit testimony. (Marzigliano Decl. ¶ 10.) "Pursuant to the provisions of 'Article 9-Change Orders' of the September 14, 2005 Agreement, WDF is entitled to settle subcontractor claims with the SCA, the results of which settlement are binding on the Plaintiff." (Id.)

4. Article 27 of the P.S. 4 Contracts provides that "[i]n no event shall Contractor be liable to the Subcontractor for Subcontract Work performed or for any cause whatsoever, except

to the extent that Contractor may recover therefore, from the Owner [the SCA]." (P.S. 4 Floors Contract, P.S. 4 Contract, at 17; 9/25/13 Tr. at 47–48.)

5. Exhibit B to the P.S. 4 Contracts provides that "[t]his subcontractor acknowledges that it shall not be entitled to a change order for additional money, unless a change order [is] issued by the NYCSCA." (P.S. 4 Floors Contract at 27, ¶ 19; P.S. 4 Contract at 27, ¶ 19.) As noted in paragraph 17 above, in this case, the SCA issued two change orders, one for the P.S. 4 Project in the amount of $27,622.37 (Marzigliano Decl. ¶ 12), and one for the I.S. 10 Project in the amount of $17,886.89. (Id. ¶ 52.)

6. New American does not dispute that Article 9 of the P.S. 4 Contracts governs the terms of payment for change order work. Nor does New American dispute that Article 27 limits its recovery "to the extent that [WDF] may recover . . . from the [SCA]." In fact, New American has not presented **any** alternative interpretation of the relevant provisions of the P.S. 4 Contracts that would enable it to recover amounts in excess of $27,622.37, the amount that WDF has recovered from the SCA for the change order work on the P.S. 4 Project. See Kreiss v. McCown De Leeuw & Co., 131 F. Supp. 2d 428, 436 (S.D.N.Y. 2001) (where "[p]laintiffs do not even attempt to offer an alternative, more favorable interpretation to which the contract language may be susceptible").

7. Accordingly, based upon the unambiguous language of Articles 9 and 27 of the P.S. 4 Contracts (and Exhibit B thereto), as well as Mr. Marzigliano's unrebutted testimony, the Court finds that New American's recovery against WDF for the change order work it performed at P.S. 4 is limited to $27,622.37, i.e., the amount that WDF was able to recover from the SCA. (See Findings of Fact ¶ 14, supra.)

(ii) WDF's liability to New American for change order work conducted for the I.S. 10 Project is limited to $17,886.89 (the amount approved by the SCA)

8. New American argues, in its post-trial submission, that "there is no written contract governing the parties' rights and obligations relating to Plaintiff's work on the I.S. 10 Project"; that "neither side has produced a written and signed contract"; and that it is, therefore, entitled to $294,874.86 for the additional work it performed at I.S. 10 under a theory of quantum meruit. (Pl.'s Findings and Conclusions, at 15.)[4] Defendant counters that "there exists a contract governing how payment for extra work will be determined" and that New American, therefore, "cannot bring a quantum meruit claim for extra payments beyond the original contract price." (Def.'s Conclusions of Law at 4 (citing Aviv Const., Inc. v. Antiquarium, Ltd., 687 N.Y.S.2d 344, 345 (1999).)

9. New American's contention that there is no binding agreement fails. For one thing, New American's position is contradicted by its own prior allegations in the Complaint, that "on or about August 16, 2005, Plaintiff and WDF entered into a contract in writing wherein and whereby Plaintiff agreed to provide and supply the work, labor and services, necessary and required under WDF's contract with the N.Y.C.S.C.A. for asbestos abatement at the I.S. 10 Project." (Compl. ¶ 7.) See Feldman v. Sanders Legal Group, 914 F. Supp. 2d 595, 600 n.5 (S.D.N.Y. 2012) (where "Plaintiff's only other arguments . . . are based on facts and theories . . . which directly contradict the allegations in the Complaint"). For another, "an unsigned contract

[4] At the close of trial, Plaintiff moved to amend the Complaint "to add a claim for quantum meruit." (10/3/13 Tr. at 139:20–21.) The Court instructed Plaintiff to present its quantum meruit arguments in its proposed conclusions of law. (Id. at 141:4–8 ("[THE COURT:] [Y]our argument that you are entitled to quantum meruit would, no doubt, be pursued in the conclusions of law.").)

may [as here] be enforceable, provided there is objective evidence establishing that the parties intended to be bound." Flores v. Lower East Side Serv. Ctr., Inc., 828 N.E.2d 593, 595 (N.Y. 2005).

10. The evidence in this case demonstrates clearly that the parties intended to be bound by the I.S. 10 Contract. Mr. Hadzic testified at trial that he signed the I.S. 10 Contract in three places, i.e. the Equipment Use Release, Project Labor Agreement, and Safety Rider, because he "wanted to have a contract" with WDF for the I.S. 10 Project. (Findings of Fact ¶ 20; 9/25/2013 Tr. at 41:7–45:6.) New American concedes that it "performed its services on the I.S. 10 Project in good faith" and that "those services were accepted by WDF and SCA." (Pl.'s Findings and Conclusions ¶ 34.) See Bed Bath & Beyond Inc., 860 N.Y.S.2d 107, 109 (1st Dep't 2008) ("[B]y moving forward with the project even in the absence of the fully executed Construction Agreement, [the contractor] manifested its intent to be bound by the [Letter of Intent]."); Smith v. 21 W. LLC Ltd. Liab. Co., 816 N.Y.S.2d 23, 24 (App. Div. 2006) (where the contractor "had commenced work under the contract and obtained an insurance certificate as required therein"). The I.S. 10 Contract "clearly sets forth [in writing] the price, scope of work to be performed, and time for performance," which "manifests the parties' intent to be bound by its terms." Bed Bath & Beyond Inc., 860 N.Y.S.2d at 108–09. **And, in its pretrial statement, New American explicitly argued that "it is manifest that the parties conducted themselves as though there was a signed contract between them regarding New American's work on the I.S. 10 Project."** (Pl.'s Statement at 4 (emphasis added).). During the course of this action, WDF has consistently taken the position that there was a binding, written agreement between itself and New American for the I.S. 10 Project. (See Answer, dated June 16, 2010, ¶¶ 21–22; Def.'s Statement at 4; Def.'s Conclusions of law at 1 –2.)

11. The Court finds that there was a binding, written agreement between Plaintiff and Defendant for the I.S. 10 Project. New American cannot recover under a theory of quantum meruit, which "only applies in the absence of an express agreement." Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 N.Y.2d 382, 388 (1987). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Id. Moreover, the I.S. 10 Contract contains provisions—i.e., Articles 9 and 27, and Exhibit B—that expressly provide for the amount of payment due to New American for its change order work. (P.S. 4 Floors Contract, P.S. 4 Contract at 7 ("[T]he Subcontract Price and time adjustments hereunder shall be limited to the amount and extent of the adjustments actually allowed Contractor and/or GC under the Contract Documents."); id. at 17 ("In no event shall Contractor be liable to the Subcontractor for Subcontract Work performed or for any cause whatsoever, except to the extent that Contractor may recover therefore, from the Owner [the SCA].").) Quantum meruit is, therefore, inapplicable. See Bed Bath & Beyond Inc., 860 N.Y.S.2d at 109.

12. Based upon the parties' clear intention to be bound by the I.S. 10 Contract, and the unambiguous language of Articles 9 and 27 of the I.S. 10 Contract and Exhibit B thereto, the Court finds that New American's recovery against WDF for the change order work it performed at I.S. 10 is limited to what WDF was able to recover from the SCA, i.e., $17,886.89. (See Findings of Fact ¶ 29, supra.)

IV. Conclusion & Order

For the foregoing reasons, the Clerk of the Court is respectfully requested to enter judgment in favor of Plaintiff and against the Defendant in the amount of $45,509.26. The Clerk of the Court is further directed to close this case.

Dated: New York, New York
August 27, 2014

Richard M. Berman

RICHARD M. BERMAN, U.S.D.J.